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**IN THE**

**Supreme Court of the United States**

**OCTOBER TERM, 1983**

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**ALABAMA POWER CO., et al.,**  
*Petitioners,*

**v.**

**SIERRA CLUB, et al.,**  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the District of Columbia**

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**MOTION FOR LEAVE TO FILE A BRIEF *AMICUS  
CURIAE* OF THE NATIONAL COAL ASSOCIATION AND  
BRIEF OF *AMICUS CURIAE* NATIONAL COAL  
ASSOCIATION IN SUPPORT OF PETITIONERS**

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MOTION FOR LEAVE TO FILE BRIEF  
*AMICUS CURIAE* IN SUPPORT OF  
PETITION FOR WRIT OF CERTIORARI

The National Coal Association (NCA) respectfully moves, pursuant to Rule 36 of the Rules of the Supreme Court of the United States, for leave to file the attached brief *amicus curiae* in support of the Petition for Writ of Certiorari of Alabama Power Company, *et al.*, in the above-captioned case. This motion has been made necessary by the refusal of Respondents Sierra Club, NRDC, and the states that participated below on their behalf to consent to the filing of this brief.

NCA is a trade association whose members own or operate more than 50 percent of the nation's coal producing capacity. Operation of coal mines and associated facilities owned by NCA members results in emissions of several regulated pollut-

ants to the atmosphere. In addition, NCA members supply coal to many industries, including the electric utility industry.

The D.C. Circuit's opinion directly and adversely affects the interests of NCA members. First, the opinion orders EPA to develop a definition of good engineering practice ("GEP") stack height different from the historical definition that has been used by EPA and regulated industry since the early 1970s. This decision will limit industrial growth in many areas of the country, especially those with mountainous or hilly terrain, where many NCA member companies are located. As a result, the activities of NCA members will be directly affected by this decision.

Second, the decision will require electric utilities to modify or even breach long-term coal supply contracts to meet new, more stringent emission limitations which will result from the lower court's requirement that such sources conduct atmospheric modeling based upon stringent, false stack height assumptions. This will disrupt coal markets and could generally discourage the use of coal as a source of energy. The operations of NCA member companies will be adversely affected through these constraints placed upon the burning of coal by electric utilities.

A key objective of the 1977 Clean Air Act Amendments is "to encourage and facilitate the increased use of coal..." H.R. Rep. No. 294, 95th Cong., 1st Sess. 192 (1977). The impacts of the lower court's decision on coal markets and on the operations of NCA member companies, and the inconsistency of the lower court's decision with the congressional objectives concerning the use of this nation's coal reserves, will not be adequately addressed by the parties to the case.

NCA's attached brief provides more detail concerning its interest in the disposition of this case as well as arguments in support of Petitioners' Writ of Certiorari. Accordingly, NCA respectfully moves for leave to file this brief *amicus curiae*.

Respectfully submitted,

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**BRIEF OF *AMICUS CURIAE* NATIONAL COAL  
ASSOCIATION IN SUPPORT OF PETITIONERS**

This brief is submitted by the National Coal Association (NCA) in support of the Petitioners. For the reasons stated in the Petition for Certiorari of Alabama Power Co., *et al.* and for the additional reasons stated herein, NCA urges the Court to grant certiorari and reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit. Pursuant to Rule 36 of the rules of this Court, a motion for leave to file this *amicus* brief has been filed with the Court.

**INTEREST OF NATIONAL COAL ASSOCIATION**

The membership of the National Coal Association consists primarily of coal producing and sales companies, whose operations comprise more than one-half of the commercial coal production in the United States. In addition, the Association numbers among its membership equipment manufacturers,

railroads, coal exporters, and other related industries. Coal mines and related facilities owned or operated by NCA members are located throughout the United States.

Under § 110 of the Clean Air Act (CAA), 42 U.S.C. § 7410 (Supp. V 1981), states must develop implementation plans that contain emission limitations for individual sources which ensure that emissions from these sources will not cause or contribute to ground level pollution concentrations that exceed the National Ambient Air Quality Standards ("ambient standards") or Prevention of Significant Deterioration ("PSD") increments. 42 U.S.C. §§ 7410(a)(2)(A), (B), (J), 7475 (Supp. V 1981). Since the early 1970s, emission limitations in state implementation plans ("SIP") have been set to reflect ambient concentrations that will be produced if emissions from a source are released to the atmosphere through a "good engineering practice" ("GEP") stack. "GEP stack height" is an established engineering and regulatory principle, used in EPA guidelines as early as 1973 and written into the Clean Air Act by Congress in 1977 as § 123, 42 U.S.C. § 7423 (Supp. V 1981).<sup>1</sup>

While facilities operated by NCA members are not directly subject to the "GEP stack height" provisions of the Clean Air Act since they do not have large stacks, such facilities are often located in the vicinity of industrial sources with large stacks. Accordingly, emission limitations for these NCA member facilities must be set assuming that emissions from surrounding facilities are released through GEP stacks. If GEP stack height credit rules are changed for surrounding facilities, therefore, emission limitations for these NCA member facilities may also be affected. Moreover, new development of coal reserves near facilities with large stacks could be precluded under the lower court's decision if sources subject to these rules are required to assume a GEP stack height that will result in predictions that PSD increments are entirely consumed or that ambient concen-

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<sup>1</sup> See EPA 1973 Stack Height Guidelines, 38 Fed. Reg. 25697, *et seq.* (1973), which appear in relevant part in Appendix to Petition for a Writ of Certiorari filed by Petitioners Alabama Power Co., *et al.* at 103a-105a (hereinafter "App."); see also 41 Fed. Reg. 7450, *et seq.* (1976).



trations are at the level of the ambient standards. See Petition for Certiorari of Alabama Power Co., *et al.*, at 27 n.59; *Sierra Club v. EPA*, 719 F.2d 436, 446-450 (D.C. Cir. 1983), App. 19a-20a, 24a-27a.

A large portion of the coal produced by NCA members is consumed by the electric utility industry. The contractual relationships between NCA members and electric utilities are dictated in large part by federal environmental regulations, which require, *inter alia*, that utilities buy coal that can be burned in compliance with emission limitations established under the Clean Air Act. Since GEP stack height credit rules will influence the stringency of power plant emission limitations, changes in these rules will affect existing contracts between coal companies and utilities.

NCA's membership will be substantially and adversely affected by the opinion of the Court of Appeals for the District of Columbia Circuit in *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983), App. 1a-69a. This decision changes the ground rules concerning "GEP stack height" credit that have been applied by EPA and the states for over a decade in formulating emission limitations, and that have served as the basis for contracts between coal companies and utilities. By rejecting the traditional engineering standard that has long applied to construction of stacks, and instead requiring that "EPA must be more stringent" than this long-established standard, *id.* at 450, App. 28a, the D.C. Circuit's decision will undermine existing state air quality programs and existing contractual relationships. Accordingly, it is critical that the Court accept this case for review.

## STATEMENT OF THE CASE

Section 123 of the Clean Air Act provides that when states set emission limitations for sources constructed after 1970, they shall not allow credit for dispersion of pollution associated with stack height in excess of GEP stack height. In other words, if a

source builds a stack higher than GEP height, it must assume in setting its emission limitation that its emissions are released at the level of the shorter GEP stack, which results in higher ground level concentrations than occur in reality. Section 123 requires EPA to define "GEP stack height" by regulation. CAA § 123(a),(c), 42 U.S.C. § 7423(a), (c) (Supp. V 1981).

The term "GEP stack height" has a long engineering history. An engineering rule (a stack must equal at least 2.5 times the height of the source) has traditionally been applied to ensure that atmospheric turbulence (called "downwash") created by nearby structures and terrain will not drive an undispersed plume directly to the ground.<sup>2</sup> Downwash can cause nuisance conditions or ambient standard violations. This engineering rule was adopted by EPA in its 1973 guidelines on stack height. 38 Fed. Reg. 25697, *et seq.* (1973), App. 103a-105a. NCA members have relied upon this longstanding GEP rule in developing Clean Air Act compliance strategies, and in contracting with utilities for the supply of coal.

In January 1979, EPA proposed rules defining "GEP stack height" that departed from this traditional engineering rule. 44 Fed. Reg. 2608, *et seq.* (1979). By changing the ground rules that sources and states had used in developing compliance strategies, these proposals would have imposed tremendous burdens on the coal industry. *See infra* pp. 7-9.

In response to strong criticisms from industry and states, EPA began rethinking these rules in 1979-81, and repropoed its GEP rules in October 1981. *See* 44 Fed. Reg. 40359, *et seq.* (1979); 46 Fed. Reg. 24596, *et seq.* (1981); 46 Fed. Reg. 49814, *et seq.* (1981). The final regulations, issued in early 1982, defined the term "GEP stack height" and related technical terms (i.e., "excessive concentrations," "nearby structures," "nearby terrain obstacles") in a manner consistent with the

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<sup>2</sup> *See* EPA Guideline for Determination of Good Engineering Practice Stack Height (Technical Support Document for the Stack Height Regulations), EPA-450/4-80-023 at 7-9 (July 1981), in Joint Appendix, *Sierra Club v. EPA*, at 1080-82 (hereinafter "J.A.").

1973 guidelines and historical engineering practice. 47 Fed. Reg. 5864, *et seq.* (1982), App. 80a-102a. EPA also developed a technical atmospheric modeling rule (called the "plume impaction rule") to ensure that its definition of "GEP stack height" would be applied consistently both in areas of flat and mountainous terrain. *Id.* at 5866-67, 5869, App. 90a-94a, 100a.

By adopting the historical approach to GEP, EPA's rules would only have required revision of emission limitations at sources that had built stacks taller than could be justified from an engineering standpoint, in order to gain an unfair emissions control advantage. In other words, for sources designing stacks in accordance with traditional engineering principles used by EPA and the states since 1973, the final EPA rules would have given full stack height credit. At such sources, EPA's final rules would not have required reformulation of compliance strategies based upon false stack height assumptions. In addition, contractual commitments that had been made based on historical engineering and regulatory GEP principles would have been honored.

In October 1983, the D.C. Circuit set aside virtually every important portion of this regulatory program, and suggested that EPA reformulate its rules in a manner more burdensome than even the 1979 proposals that EPA had rejected. *Sierra Club v. EPA*, 719 F.2d 436 (D.C. Cir. 1983), App. 1a-69a. The court refused to accept EPA's reliance on the historical engineering formula to define the technical terms "GEP" and "excessive concentrations." Rather, it suggested that EPA define "GEP stack height" credit at a level that would cause atmospheric models to predict pollutant concentrations just below the ambient standards or PSD increments. *See supra* pp. 2-3. As a result, a different GEP stack height could be required for every pollutant for which an ambient standard exists (since allowable pollution levels and different background concentrations exist for different pollutants), and GEP stack height could change over time as background pollutant concentrations change.

The court also imposed serious constraints on industrial

activity in hilly and mountainous terrain by setting an arbitrary distance limit on EPA's definition of "nearby terrain obstacles," and by setting aside EPA's technical "plume impaction" rule. *Id.* at 445-46, 452-56, App. 15a-19a, 31a-39a.

## ARGUMENT

Section 101(b)(1) of the Act states that the purpose of the Act is "to protect and enhance the quality of the Nation's air resources *so as to promote the public health and welfare and the productive capacity of its population.*" CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1) (Supp. V 1981) (emphasis added). In other words, Congress contemplated that action taken to protect and enhance air quality would promote each of the three objectives of the Act (public health, welfare, *and* productive capacity). In implementing the Clean Air Act, EPA has specifically recognized that these objectives require a "balancing of the social and economic considerations with the environmental implications" of a rule. 39 Fed. Reg. 31000 (1974).

Congress identified the continued use and development of this nation's coal resources as a key ingredient to furthering the productive capacity of the nation. Thus, when § 123 was added to the Act in 1977, the House Committee on Interstate and Foreign Commerce noted that "[t]he committee has designed . . . the entire bill, to encourage and facilitate the increased use of coal . . . ." <sup>3</sup> Furthermore, the Conference agreement that resulted in the 1977 Amendments was described by the House Committee as reflecting an effort to further "the basic purposes of . . . the act, such as maximizing the use of locally available fuels." <sup>4</sup> The court below wholly ignored this legislative intent in setting aside EPA's rules. It did so even though EPA specifically confronted the effects of § 123 rules on coal reserves during the rulemaking and fashioned final rules that were consistent with the congressional purpose to facilitate coal use.

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<sup>3</sup> H.R. Rep. No. 294, 95th Cong., 1st Sess. 192 (1977), reprinted in The Environmental Policy Division of the Congressional Research Service of the Library of Congress, *A Legislative History of the Clean Air Act Amendments of 1977* (1978) at 2659 (hereinafter referred to as "1977 Legis. Hist.").

<sup>4</sup> H.R. Rep. No. 364, 95th Cong., 1st Sess., 1977 *Legis. Hist.* at 510.

In a regulatory analysis of the stack height credit rules proposed in 1979, EPA recognized that its initial stack height proposals

will cause a shift in the type of coal demanded by the affected utilities. Some utilities will switch to a lower sulfur coal to comply with the regulation, while other power plants, required to install FGD systems, may be able to use a higher sulfur coal with the FGD system.<sup>5</sup>

Among other things, this analysis showed substantial shifts in coal production in EPA Regions III, IV, V, and VII.<sup>6</sup>

EPA addressed these serious, adverse impacts of the initial § 123 proposals by reproposing and then promulgating rules which were much more in line with traditional engineering and regulatory practice. In its final regulatory impact analysis, therefore, EPA concluded that the "effect on the coal market [of these final rules] is . . . less than previously predicted."<sup>7</sup>

NCA is concerned that the D.C. Circuit's decision, by changing the longstanding ground rules that have been used in formulating SIPs, will create needless economic burdens, administrative complexity, and confusion, contrary to the basic purposes of the Act.

First, as noted above, EPA's regulatory analysis of the 1979 proposal revealed that substantial, adverse impacts on coal markets would result from that proposal. Significantly, none of these EPA analyses took into account the additional burdens that would have been placed on sources in hilly and mountainous terrain by the 1979 proposal's failure to address the highly technical "plume impaction" issue. Accordingly, these analyses were criticized during the rulemaking as signifi-

<sup>5</sup> EEA, Inc., Cost and Economic Impact Analysis of the Proposed Stack Heights Regulation at 19 (August 15, 1980).

<sup>6</sup> See *id.* at 19-20, 22-23. These regions include the Appalachian and South-Central states, the Midwest, and some Western states. These potential impacts were also alluded to by EPA in reproposing stack height rules in 1981. 46 Fed. Reg. 49816 (1981).

<sup>7</sup> Impact Assessment Report for the Stack Heights Regulations at 19 (April 1981).

cantly understating the shifts in demand for and production of coal that would have resulted under the 1979 proposal.<sup>8</sup> Thus the lower court's decision, by rejecting the traditional GEP standard and EPA's plume impaction rule, could cause even more severe disruption of coal markets than was predicted in 1979.

Second, besides causing shifts in demand among coal producing regions and among coals of varying sulfur content, the lower court's decision would discourage the use of coal generally in favor of alternative sources of power. For example, many utilities have located plants in hilly and mountainous areas of the country in order to be close to inexpensive supplies of coal. The lower court, however, has interpreted § 123 so that it "discriminates harshly" against industrial activity in such areas of the country. 719 F.2d at 455, App. 38a. If, as the court has found in its decision on "plume impaction," plants in rugged terrain areas must meet emission limitations that are based upon artificial predictions of plume impaction, existing coal-fired plants in such areas could be rendered prohibitively expensive to operate. In addition, this decision could force the siting of new plants in flat terrain areas, increasing fuel transportation costs and thus making coal less attractive for these sources.

Third, the lower court's holding on "excessive concentrations" could require GEP stack height credit to be set at a level that would cause predictions of ambient concentrations just below the level of ambient standards or PSD increments. See *supra* pp. 2-3. If this were to occur, it could limit the production, preparation, or processing of coal at any facility located in the vicinity of a power plant subject to these rules, since the power plant would have been predicted to consume all available air quality resources. Moreover, the lower court's holding would eliminate any predictability as to the long-term coal needs of utilities, since GEP stack height and hence required emission levels would shift as background concentrations and atmospheric modeling assumptions change.

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<sup>8</sup> See, e.g., Comments of Ohio EPA, J.A. 1048.



Finally, none of these costs would further any demonstrated public health or welfare objective, since SIP revisions would be based not upon actual ambient concentrations that have public health and welfare implications, but upon artificial ambient concentrations predicted using false atmospheric modeling assumptions.

In sum, while Congress in amending the Act in 1977 intended to facilitate the burning of coal generally and to avoid any drastic shifts in the demand for and production of coal, the lower court's decision compels results contrary to these basic congressional objectives. The court's decision would greatly expand the role of false stack height assumptions in air quality regulation at the expense of this nation's coal reserves. EPA received comments on these issues, and took those comments into account in formulating rules that reflect traditional engineering and regulatory principles as well as the basic purposes of the Act. The lower court should have deferred to EPA's resolution of such complex, technical issues, as it has done in the past when EPA has interpreted the term "good engineering practice" under another section of the Clean Air Act.<sup>9</sup>

The final rules are, by the lower court's own admission, consistent with longstanding engineering and regulatory practice and with what Congress "probably had in mind." *Id.* at 457, App. 42a-43a. By rejecting these rules and requiring EPA to rewrite its § 123 program in accordance with the court's independent conclusions as to what Congress may have intended, and contrary to what Congress clearly intended with respect to the Clean Air Act's impact on coal production, the D.C. Circuit has exceeded its authority as a reviewing court. Accordingly, certiorari should be granted and the decision of the D.C. Circuit reversed.

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<sup>9</sup> See *Motor Vehicle Manufacturers Ass'n v. Ruckelshaus*, 719 F.2d 1159, 1167 (D.C. Cir. 1983).

CONCLUSION

For the reasons stated above, the petition for certiorari filed by Alabama Power Co., *et al.*, should be granted.

Respectfully submitted,

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